

UNITED STATES
v.
ROBERT B. SAINBERG

IBLA 70-126

Decided March 31, 1972

Appeal from decision (Contest AR 032481 (Arizona)) by Office of Appeals and Hearings, Bureau of Land Management, affirming decision by the Arizona land office declaring mining claim null and void for failure to file timely answer to contest complaint.

Affirmed as modified.

Mining Claims: Contests--Rules of Practice: Government Contests

Where a Government contest complaint against a mining claim contains charges which, if proven, would render the claim invalid, and the contestee fails to file a timely answer to the complaint, the allegations of the complaint will be taken as admitted by the contestee and the claim is properly declared null and void by the land office manager under the Department's regulations governing such contests, which allow no exception for appellant's alleged reasons of mistake, inadvertence and excusable neglect.

APPEARANCES: Favour and Quail for appellants; Richard L. Fowler, Attorney in Charge, U.S. Department of Agriculture, Albuquerque, New Mexico, for the Government.

OPINION BY MRS. LEWIS

This is an appeal by Robert B. Sainberg and others from a decision dated January 28, 1970, whereby the Office of Appeals and Hearings, Bureau of Land Management, acting for the Director, affirmed a decision by the Arizona land office declaring the Silver Dollar No. 1 lode mining claim null and void for failure to file a timely answer to a contest complaint.

On April 22, 1963, Robert B. Sainberg filed mineral patent application AR 032481 for the Silver Dollar No. 1 lode mining claim, together with six other lode claims, in the W 1/2 sec. 25, T. 13 N., R. 2 W., G. & S.R.M. (M.S. no. 4536), Arizona. He amended the application on January 17, 1964, to exclude all claims except the Silver

Dollar No. 1. A certificate of title dated April 22, 1963, at 5:00 p.m., and a title opinion show the possessory title to the claim to have been vested in the applicant on the date the original patent application was filed.

Rose Mary Druse, as Guardian of the Estate of Frank Patrick Vallely, an incompetent, filed an adverse claim against Sainberg's patent application on October 27, 1964. She then timely initiated a suit against Sainberg in the Superior Court of the State of Arizona in and for the County of Yavapai. By its judgment and decree entered on July 16, 1968, the Court stated that the matter had been fully and finally determined by stipulation, as a result of which the Court quieted title to the Silver Dollar No. 1 lode mining claim in the Defendant, Robert B. Sainberg, and as to the six other lode mining claims, which had been included in Sainberg's original patent application, in the Plaintiff, Rose Mary Druse, as Guardian of the Estate of Frank Patrick Vallely, an incompetent. On March 19, 1969, the Clerk of the Court issued a certificate stating that the foregoing judgment is a final judgment as no appeal had been filed by either party within the required time.

On June 11, 1968, Sainberg executed a power of attorney appointing Rose Mary Druse as his attorney in fact to prosecute the subject patent application on the Silver Dollar No. 1 lode mining claim to completion.

The land office issued mineral entry final certificate AR 032481 for the Silver Dollar No. 1 claim on March 28, 1969, providing that patent may issue if all is found regular and upon demonstration and verification of a valid discovery of a valuable mineral deposit. Thereafter, on the recommendation of the Forest Service, U.S. Department of Agriculture, based upon a Forest Service Mineral Examiner's report of examination of the claim, the land office, on October 9, 1969, issued a complaint against the claim naming Robert B. Sainberg as contestee and alleging lack of a valid mineral discovery and that the land within the claim is nonmineral in character. The charges contained in the complaint would, if proven, render the claim invalid, thus resulting in a declaration of invalidity of the claim, rejection of the patent application, and cancellation of the mineral entry. The parties named in the complaint to be served for the contestee are Favour and Quail, attorneys for Robert B. Sainberg, and Rose Mary Druse, Attorney in Fact for Robert B. Sainberg, c/o Favour and Quail. The complaint was served on Favour and Quail and Rose Mary Druse on October 13, 1969.

The complaint contained a notice with a warning that unless contestee filed an answer to the complaint within 30 days after service thereof, the allegations of the complaint would be taken as admitted

and the case would be decided without a hearing, in accordance with the applicable regulations. 1/

An answer was filed on behalf of Robert B. Sainberg on November 13, 1969, at 3:53 p.m., by his attorneys, Favour and Quail and Max M. Klass. As the 30-day period prescribed by the regulations for filing an answer expired on November 12, 1969, the answer should have been filed on or before that date. As a result, Arizona land office decision of November 19, 1969, declared the claim null and void for failure to file the answer timely.

In appealing to the Director, Bureau of Land Management, Robert B. Sainberg was joined by Rose Mary Druse, Frank P. Vallely, Jr., and William Vallely, heirs-at-law of Frank Patrick Vallely, deceased, as persons adversely affected by the land office decision, appearing specially by the appeal "to assert the lack of jurisdiction of the Department in all prior proceedings over their persons and their interest in the subject mining claim." Attached to the appeal is a copy of a Power of Attorney Coupled With An Interest in which Sainberg appointed Rose Mary Druse as his attorney in fact to convey to Frank Patrick Vallely and his heirs any or all of his right, title, claim, or interest in and to the subject mining claim. 2/ The instrument was executed June 11, 1968, the same date on which Sainberg executed the power of attorney appointing Rose Mary Druse as his attorney in fact to prosecute the subject patent application to completion, supra.

By its decision of January 28, 1970, the Office of Appeals and Hearings, Bureau of Land Management, affirmed the land office decision. It declared the claim null and void, correctly stating that the pertinent regulations, footnote 1, supra, requiring the filing of an answer to a contest complaint within 30 days after service, are mandatory and have been strictly enforced, citing numerous Departmental decisions in support thereof. The appellant admitted that the answer was filed late but contended that the manager erred in rejecting his answer, in that the one-day delay in filing was the result of mistake, inadvertance, and excusable neglect. The regulations make no allowance for an exception for such reasons. The Department has consistently rejected reasons for delay, some of which might be considered more cogent than those advanced by the appellant. See United States v. Ray L. Pruett and Freida C.

1/ 43 CFR 1852.1-6, now 43 CFR 4.450-6, 36 F.R. 7203 (April 15, 1971), and 43 CFR 1852.1-7(a), now 43 CFR 4.450-7(a), 36 F.R. 7203 (April 15, 1971). These regulations concerning the filing of an answer are applicable in government contests. 43 CFR 4.451-2, 36 F.R. 7203 (April 15, 1971), formerly 43 CFR 1852.2-2.

2/ The case file does not contain an original of this instrument, and there is a note in the file indicating that it was not before the land office at the time its decision was rendered.

Pruett, 3 IBLA 23 (1971); United States v. George Ernsbarger, 1 IBLA 83 (1970); United States v. Willie Walker, 1 IBLA 29 (1970); United States v. Henry Gilligan et al., A-28857 (February 19, 1962); United States v. J. Hubert Smith, 67 I.D. 311, 312 (1960).

The appellants raised the same contentions in their appeal to the Secretary of the Interior as they did in their appeal to the Director. Several of these contentions were effectively disposed of by the Bureau and we see no reason to repeat at this time. We shall answer the following contentions: the manager's decision is illegal and void because he was not authorized to file a complaint on behalf of the Forest Service, and because Robert B. Sainberg is not the real party in interest in the subject claim, and the heirs of Frank Patrick Vallely, deceased, by reason of their interest therein, were not joined and served as contestees, thus being deprived of their property without due process of law.

With respect to the authority of the land office manager to file complaints on behalf of the Forest Service, subsections 1.2(e) and 2.2(d) of Bureau of Land Management Order No. 701, 29 F.R. 10526 (July 23, 1964), authorized state directors or land office managers to initiate Government contests against claims asserted to public lands, and to take all necessary actions involving the prosecution of such contests except the presentation of the Government's case at the hearing. Furthermore, regulation 43 CFR § 1862.4 (1971), which was issued under authority of 43 U.S.C. § 1201 (1964), reads:

In no claim, mineral or nonmineral, shall patent issue for land within a national forest until the Bureau of Land Management is notified by, or ascertains from, the Forest Service, that the claim will not be contested. A claim may be contested by the Forest Service at any time prior to the issuance of patent.

Procedures implementing this regulation are set forth in a 1957 Memorandum of Understanding between the Forest Service and the Bureau of Land Management. The actions taken by the Forest Service and the land office manager are in accord with the regulation and procedures.

There is no merit in appellant's contention that the heirs of Frank Patrick Vallely, deceased, should have been joined and served as contestees. Sainberg filed his mineral patent application on April 22, 1963, and later filed a certificate of title showing title to the Silver Dollar No. 1 lode to be vested in him as of that date. The adverse claim filed by Rose Mary Druse, as Guardian of the Estate of Frank Patrick Vallely, an incompetent, was filed on October 27, 1964, as a result of which the Court adjudicated title to the Silver Dollar No. 1 to be vested in Sainberg by its Judgment and Decree of

July 16, 1968. Shortly before that, on June 11, 1968, Sainberg appointed Rose Mary Druse as his attorney in fact to prosecute the patent application to completion. The land office served Sainberg's attorneys and Rose Mary Druse, as attorney in fact for Sainberg, with the complaint. Therefore, Rose Mary Druse, as Sainberg's attorney in fact, and who is also shown by evidence in the case file to be one of the children and heirs of Frank Patrick Vallely, was afforded every opportunity to protect any interest of Vallely's heirs in prosecuting Sainberg's patent application to completion.

Appellants have also requested a hearing to present evidence on questions of fact pursuant to 43 CFR 1843.5, 3/ contending that the contestant has controverted the allegations in their appeal in challenging the rights of the heirs of Frank Patrick Vallely, deceased. They have also asked for an oral argument. In view of our holding herein, no purpose would be served by an oral argument or a fact-finding hearing.

Accordingly, the land office correctly declared the Silver Dollar No. 1 lode mining claim null and void. For this reason, Sainberg's mineral patent application is rejected and mineral entry AR 032481 is canceled.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the decision appealed from is affirmed as modified.

Anne

Poindexter Lewis, Member

We concur:

Edward W. Stuebing, Member

Joan B. Thompson, Member

3/ Now codified as 43 CFR 4.415, 36 F.R. 7200 (April 15, 1971), without substantive change. The allowance of a request for hearing is within the discretion of the Board of Land Appeals.

